

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 19, 2003

STATE OF TENNESSEE v. JOHN BRIAN MESSER

Appeal from the Circuit Court for Rutherford County
No. F-46764 J. Steve Daniel, Judge

No. M2003-00663-CCA-R3-CD - Filed May 11, 2004

The defendant, John Brian Messer, entered a plea of guilt to robbery. See Tenn. Code Ann. § 39-13-401. Pursuant to a plea agreement, the trial court ordered the sentence of four and one-half years in the Department of Correction to be served on probation. After the entry of the second violation of the terms of his probation, the trial court ordered that the defendant serve the sentence originally imposed. The defendant sought to withdraw his plea, arguing that the state had violated the plea agreement. After finding that it lacked jurisdiction, the trial court denied the motion without a hearing. In this appeal of right, the defendant contends that the trial court erred by denying the motion to withdraw the guilty plea without appointing counsel and holding a hearing. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which THOMAS T. WOODALL and NORMA MCGEE OGLE, JJ., joined.

Tony L. Maples, Murfreesboro, Tennessee, for the appellant, John Brian Messer.

Paul G. Summers, Attorney General & Reporter; Elizabeth T. Ryan, Assistant Attorney General; and William C. Whitesell, Jr., District Attorney General, for the appellee, State of Tennessee.

OPINION

On October 24, 1998, the defendant entered a Chili's restaurant in Rutherford County where he had been previously employed. He approached the counter and asked the victim, Jodi Lynn Cheatham, who was working at the cash register, for change for a twenty-dollar bill. As Ms. Cheatham attempted to comply with the defendant's request, she placed a change bag, holding approximately \$250.00, on the counter. The defendant then grabbed the victim's arm, took the change bag, and escaped through an emergency door. On February 10, 1999, the defendant entered a plea of guilt to robbery and received a suspended sentence of four and one-half years. On

November 22, 1999, the probation was revoked and he was ordered to serve his sentence in jail. Later, the defendant was returned to probationary status.

October 1, 2000, the defendant was arrested by the Rutherford County Sheriff's Department and charged with theft under \$500. The defendant did not report his arrest to his probation officer. Five months later, a probation violation warrant was filed. On May 3, 2001, the warrant was amended to allege that the defendant had committed additional violations by driving under the influence (2nd offense), by violating the implied consent law, and by failing to report the charges to his probation officer. On September 25, 2001, the trial court entered an order finding that the defendant had violated his probation and requiring service of the Department of Correction sentence as originally imposed less jail credits.

In 2003, over four years after the original plea, the defendant filed a pro se "Motion to Vacate Plea Bargain Agreement." He alleged that the state had violated the plea agreement because he was serving his sentence in the Rutherford County Detention center, not the Tennessee Department of Correction, as contemplated by the original plea agreement. On February 28, 2003, citing Tennessee Rule of Criminal Procedure 32(f), the trial court denied the defendant's motion because of lack of jurisdiction.

In this appeal, the defendant argues that the trial court erred by denying the motion to withdraw the guilty plea without appointing counsel and holding a hearing. Tennessee Rule of Criminal Procedure 32(f) provides as follows:

A motion to withdraw a guilty plea may be made upon a showing by the defendant of any fair and just reason only before sentence is imposed; but to correct manifest injustice, the court after sentence, but before the judgment becomes final, may set aside the judgment of conviction and permit the defendant to withdraw the plea.

(Emphasis added).

When a defendant waives his right to appeal at the time of the plea, the judgment becomes final for purposes of Rule 32(f) thirty days after it has been entered. State v. Green, 106 S.W.3d 646 (Tenn. 2003). The trial court is without jurisdiction to hear and decide a motion to withdraw a guilty plea after the judgment is final. State v. Peele, 58 S.W.3d 701, 704 (Tenn. 2001). It is apparent that the defendant filed his motion after the judgment of the trial court had become final. Here, the defendant attempted to withdraw his guilty plea some four years after its entry. In consequence, the trial court was without jurisdiction to grant the request.

Accordingly, the judgment of the trial court is affirmed.

GARY R. WADE, PRESIDING JUDGE